Supreme Court, U.S.
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No. 99-1908

In the

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress intended to create a private cause of action in federal court against a state agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and the Center for Equal Opportunity respectfully submit this brief amici curiae in support of Petitioner.[1] Written consent for amici participation in this case has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

Attorneys for Pacific Legal Foundation have previously litigated questions regarding the scope and meaning of Title VI of the Civil Rights Act of 1964. For example, Pacific Legal Foundation attorneys represented the California State Board of Education in a case alleging that California's Proposition 227, an initiative replacing bilingual education with English emersion, violated federal regulations promulgated pursuant to Section 602 of Title VI. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998). Pacific Legal Foundation also participated as amicus in *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999), a case alleging that minimum standardized testing scores had a disparate impact on African-American

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

student athletes in violation of regulations promulgated under Section 602 of the Civil Rights Act.

PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Center for Equal Opportunity (CEO) is an unincorporated project of the Equal Opportunity Foundation, Inc., a District of Columbia nonprofit corporation. CEO's main purpose is to study issues concerning race, ethnicity, and language. CEO has participated actively in cases involving the question of whether regulations promulgated pursuant to Section 602 of Title VI create a private right of action. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007. CEO has previously litigated civil rights cases before this Court. For example, CEO was amicus curiae in *Rice v. Cayetano*, 120 S. Ct. 1044 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

PLF and CEO believe their public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented.

INTRODUCTION

This case reaffirms Chief Justice Marshall's observation from nearly two centuries ago that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 6 U.S. 358, 386 (1805). The court below was confronted with the question of whether there is "an implied private cause of action to

enforce agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1." *Sandoval v. Hagan*, 197 F.3d 484, 502 (11th Cir. 1999). In answering this question the court looked to the Third Circuit Court of Appeal's decision in *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted, sub nom.* 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998).

The *Seif* court had concluded that a private right of action to enforce agency regulations promulgated under Section 602 of Title VI does exist. This decision was based, in no small part, on what the Third Circuit perceived to be Congress' intent to create such a private cause of action. In reaching this decision, however, the Third Circuit misapplied this Court's teachings on the proper method of determining legislative intent. Specifically, the Third Circuit looked only to the congressional history surrounding the 1987 amendments to Title VI and did not, as this Court's precedents require, look to the intent of the Congress that initially passed the Civil Rights Act of 1964. The Third Circuit's error has been compounded by the decision below, which does not make an independent review of congressional intent but instead relies upon the Third Circuit's reasoning.

As both the court below and the Third Circuit recognized, this Court has never squarely addressed the issue of whether Title VI creates a private cause of action to enforce disparate impact regulations. *Sandoval*, 197 F.3d at 504 (noting that this Court "has yet to squarely answer" this question); *Seif*, 132 F.3d at 932 ("applicable Supreme Court precedent is not dispositive"). In the absence of guiding precedent from this Court, lower courts have and will continue to struggle with the question of whether an implied private cause of action exists to enforce Section 602 regulations. In this pursuit courts will (and have) seize everything from which aid can be derived, including the erroneous decision issued by the Third, and now the

Eleventh, Circuit Courts of Appeals. This Court should grant the petition for writ of certiorari in order to decide this important federal question.

STATEMENT OF THE CASE

The people of the State of Alabama amended their constitution to make English the official language of the state. Ala. Const. amend. 509. Pursuant to this amendment, the Alabama Department of Public Safety adopted a policy requiring that the state's driver's license examination be given only in English. *Sandoval*, 197 F.3d at 488. Martha Sandoval filed suit against the Alabama Department of Public Safety and its director L.N. Hagan, challenging this policy on behalf of herself and all others similarly situated. The suit alleged that Alabama's policy discriminated on the basis of national origin in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and its implementing regulations.

The United States District Court for the Middle District of Alabama certified a class consisting of all legal residents of the State of Alabama who are otherwise qualified to obtain a private vehicle driver's license but cannot do so because of the English language testing requirement. *Id.* at 488. The district court ruled that there was an implied right of action to enforce disparate impact regulations promulgated by the United States Departments of Justice and Transportation[2] and that Alabama's English-only driver's license testing requirement had a disparate impact on the basis of national origin. The court enjoined the use of the English-only testing policy. *Id.* at 489.

[2] The regulations on which this suit is predicated prohibit recipients of federal funding from "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons [individuals] to discrimination based on their race, color, or national origin." 49 C.F.R. § 21.5(b)(2) and 28 C.F.R. § 42.104(b)(2).

The Eleventh Circuit Court of Appeals affirmed.[3] After looking to Eleventh Circuit precedent, which supported the claim that an implied private right of action exists under regulations promulgated pursuant to Section 602 of Title VI, the court noted that "[t]he only other circuit to have addressed the issue in detail" had also reached this conclusion. *Id.* at 504 (citing *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d at 936-37). The court explained that the *Seif* court had read this Court's precedent to "strongly suggest" that an implied cause of action exists under Section 602. *Id.* Rather than undertake an independent review of Title VI's legislative history, the court below was content to note that "[t]he *Seif* court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history." *Id.*

The court then turned to this Court's precedent and concluded:

> Although the Court has yet to squarely answer the question before us, we believe that a close reading of *Lau* [*v. Nichols*, 414 U.S. 563 (1974)], *Guardians* [*Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983)], and *Alexander*

[3] Before addressing the Title VI issue, the court below held that the suit was not barred by the Eleventh Amendment to the United States Constitution. The rationale for this conclusion was twofold. First, according to the court, by voluntarily accepting federal funding, the Alabama Department of Public Safety had waived any sovereign immunity claim. *Sandoval*, 197 F.3d at 500. Second, even if the action against the state were barred, the action against Director Hagan for injunctive relief could proceed under the *Ex Parte Young* doctrine. *Id.*

> [*v. Choate*, 469 U.S. 287 (1985)] necessarily establishes several holdings logically supporting an implied private cause of action under Section 602 of Title VI.

Id.

After concluding that an implied private cause of action does exist under Section 602, the court held that the district court did not err in its conclusion that the English-only examination requirement constituted a disparate impact on the basis of national origin. *Sandoval*, 197 F.3d at 511.

SUMMARY OF ARGUMENT

United States Supreme Court Rule 10(c) provides that a petition for writ of certiorari may be granted when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Each of these concerns is raised by this case.

First, as the court below acknowledged, the question of whether there exists an implied private cause of action to enforce agency regulations promulgated under Section 602 of Title VI has not been squarely answered by this Court. This claim is borne out by the precedent of this Court, the observations of lower courts and commentators, as well as this Court's decision to grant the petition for writ of certiorari in a case raising this issue.

Second, the court below endorsed and relied upon the Third Circuit's holding that the legislative history of Title VI supported a conclusion that an implied private cause of action does exist. The Third Circuit's analysis of whether Congress intended to create such a cause of action, however, conflicts with the relevant decisions of this Court regarding the proper method of determining congressional intent. Rather than

looking to evidence providing some indication of what the Congress originally ***enacting*** Title VI in 1964 intended, the Third Circuit relied solely upon legislative history generated by the Congress which ***amended*** Title VI in 1987. This formula for determining congressional intent has been repeatedly disavowed by this Court. Because the lower courts attempting to answer this important question of federal law have engaged in an analysis of legislative intent which is at odds with the holding of this Court, the petition should be granted.

ARGUMENT

I

THIS COURT HAS NOT YET DECIDED WHETHER THERE IS AN IMPLIED CAUSE OF ACTION TO ENFORCE AGENCY REGULATIONS PROMULGATED UNDER SECTION 602 OF TITLE VI

In *Guardians Association* this Court issued a highly fractured opinion from which a "two-pronged holding on the nature of the discrimination proscribed by Title VI emerged." *Alexander v. Choate*, 469 U.S. 287, 293 (1985). First, this Court made clear that a private cause of action may be brought pursuant to Section 601 of Title VI of the Civil Rights Act of 1964.[4] *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 607 n.27 (1983); *Alexander*, 469 U.S. at 293-94. As with a claim arising under the Fourteenth Amendment to the United States Constitution, an action predicated on Section 601 of Title VI requires the plaintiff to demonstrate discriminatory intent. *Alexander*, 469 U.S. at 293 ("Title VI itself directly reaches only instances

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[4] Section 601 of Title VI of the Civil Rights Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

of intentional discrimination."); ("Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.") *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (citations omitted).

This Court has also held that federal agencies have the authority under Section 602 of Title VI to promulgate regulations which prohibit recipients of federal funding from engaging in actions which have a disparate impact on the basis of race, color, or national origin. *Alexander*, 469 U.S. at 293-94 ("In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remedial, to warrant altering the practices of the federal grantees that had produced those impacts."). How these "two prongs" intersect, if at all, is a question that has not been addressed by the Court. In other words, may a Section 601 intentional discrimination private cause of action also be brought to enforce discriminatory impact regulations promulgated pursuant to Section 602?

Both the Third and Eleventh Circuits have recognized that this Court's precedent does not dispose of the issue. As the Third Circuit explained after reviewing this Court's Title VI jurisprudence:

> This inference from Guardians may be justified, but we find no direct authority in Alexander that either confirms or denies the existence of a private right of action. Consequently, we decline to hold that a private right of action exists based on Guardians and Alexander alone.

Seif, 132 F.3d at 931. ("Having determined that the applicable Supreme Court precedent is not dispositive, we look to our own precedent.") *Id.* at 932. The court below, although more

willing than the Third Circuit to look to this Court's precedent in an attempt to divine whether a private right of action existed to enforce Section 602 regulations, also noted that this Court's jurisprudence did not "squarely answer" the question. *Sandoval*, 197 F.3d at 504.

Nor are the Third and Eleventh Circuits alone in their conclusion that this Court's jurisprudence does not make clear whether there exists an implied private right of action to enforce Section 602 regulations. Commentators have also noted that this question remains undecided by this Court.

> Accordingly, five members of the Court implicitly recognized a private right of action for disparate impacts under Title VI's implementing regulations. However, because Guardians did not directly address whether a private right of action exists under Title VI's implementing regulations, the issue remains unresolved.

Badford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 Colum. J. Envtl. L. 1, 34 (1999) (footnotes omitted). *Accord* Jimmy White, *Comment: Environmental Justice: Is Disparate Impact Enough?*, 50 Mercer L. Rev. 1155, 1174 (1999) ("Whether a private right of action existed under the regulations was not, however, explicitly addressed in Guardians Ass'n.").

Perhaps the best evidence that *Guardians* and its progeny do not address the question presented by this case is found in the procedural history of the *Seif* case. In *Seif* the Third Circuit concluded that private plaintiffs could maintain an action under disparate impact regulations promulgated under Section 602 of Title VI. *Seif*, 132 F.3d at 937. James Seif, in his capacity as

Secretary of the Pennsylvania Department of Environmental Protection, and other State Defendants filed a petition for writ of certiorari which presented the sole question:

> Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of Title VI of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?

Petition for Writ of Certiorari at i, *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915 (1998) (No. 97-1620). This Court granted the petition for writ of certiorari. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915. Following respondent's suggestion of mootness, the case was remanded to the United States Court of Appeals with instructions to dismiss. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). This case presents the same important federal question that this Court agreed to consider in *Seif*. As other federal circuits, such as the court below, grapple with the issue of whether an implied cause of action exists to enforce agency regulations adopted pursuant to Section 602, there is an even greater need for guidance from this Court. This Court should grant the petition for writ of certiorari in this case, in order to address the important federal question that escaped review in *Seif*.

II

IN ATTEMPTING TO DETERMINE WHETHER CONGRESS INTENDED TO CREATE A PRIVATE CAUSE OF ACTION, LOWER COURTS HAVE MISAPPLIED THIS COURT'S PRECEDENT

Determining whether an implied right of action exists is governed by the four factors articulated by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975): (1) is the plaintiff one of the class for whose special benefit the statute was enacted; (2) is there any explicit or implicit indication of legislative intent to create or deny such a remedy; (3) is a private remedy consistent with the underlying purpose of the statute; and (4) is the cause of action one that is traditionally relegated to state law. Under this test the burden is on the plaintiffs to demonstrate that Congress intended to make a private remedy available. *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). The "most important inquiry" is "whether Congress intended to create the private remedy sought by the plaintiffs." *Cort*, 503 U.S. at 364. "'What must ultimately be determined is whether Congress intended to create the private remedy asserted.'" *Id.* (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979)).

In *Seif* the Third Circuit reviewed the legislative history surrounding the 1987 amendments to Title VI and, based solely on this evidence, concluded that there was "some" indication in the legislative history "of an intent to create a private right of action, in satisfaction of the *Cort* factors." *Seif*, 132 F.3d at 934. The court below did not perform an independent review of Title VI's legislative history, instead it relied upon the conclusions reached by the *Seif* court. "The *Seif* court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history." *Sandoval*, 197 F.3d at 504. In attempting to divine congressional intent, the *Seif* court, and subsequently the court below, did not look to the intent of Congress that originally enacted Section 602. This mode of analysis is inconsistent with

the teachings of this Court. This Court should grant the petition in order to properly conduct the important inquiry into whether Congress intended to create the right of action sought by Respondent.

The first and best evidence of congressional intent is, of course, the language of the statute itself and where the language of the statute is clear, the inquiry into legislative intent generally need go no further. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). There is nothing on the face of Section 602 of Title VI indicating that Congress intended for this legislation to create a private cause of action.

Indeed, the language of Section 602 shows that Congress intended that only federal agencies would enforce the provision. The section provides in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law: Provided, however, that *no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.*

42 U.S.C. § 2000d-1 (emphasis added).

Section 602 thus sets up two prongs to enforce compliance. Plainly, only federal agencies could enforce the first prong: termination or denial of financial assistance. The second prong, "any other means authorized by law," would include injunctive relief which on its face is not limited to federal agencies. However, the provision immediately following this remedy makes clear that Congress intended that it must be so limited. "[N]o such action" to use the "other means authorized by law . . . shall be taken until the department or agency concerned" has sought and failed to obtain compliance "by voluntary means." *Id.* This language makes clear the legislative intent that it is the federal "agency concerned" who is authorized to act by "other means authorized by law," including injunctive relief, but only after having attempted to obtain voluntary compliance. Such language plainly does not envision a private right of action and should have resolved the issue under the second *Cort v. Ash* factor.

The court of appeals' reliance on the subsequent legislative history of the 1987 amendments contravenes the rulings of this Court. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), required this Court to determine whether private civil liability under 10(b) of the Securities Exchange Act of 1934 extended beyond those persons who engaged in manipulative and deceptive practices to those who merely aided and abetted the violation. In an attempt to demonstrate that the Act did cover aiding and abetting liability, respondent in that case relied upon 1983 and 1988 Congressional Committee Reports. This Court rejected this attempt to use 1983 and 1988 indicia of congressional intent. "'[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Central Bank*, 511 U.S. at 185 (quoting *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989)). "In evaluating the

weight to be attached to these statements, we begin with the oft-repeated warning that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting in part *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963)). As one commentator summarized this line of authority "[s]everal Supreme Court decisions suggest that a private right of action may be implied by courts only if the original Congress enacting a statute intended to create a private right, or a subsequent Congress explicitly amended the statute to do so." Mank, *supra*, at 44.

Both the Third and the Eleventh Circuits have ignored this "oft-repeated warning" and looked ***solely*** to the legislative history that was generated by the 1987 amendments to Title VI. In *Seif* the United States as amicus suggested, and the court agreed, that the implication of a private right of action was consistent with the legislative intent because Congress was aware of the existence of a private right of action when it amended Title VI in 1987. *Seif*, 132 F.3d at 933-34. The reasoning follows that because Congress was aware of this interpretation of Section 602, and did nothing to correct it, congressional silence on the matter constitutes acquiescence. This method of determining congressional intent is flawed for two reasons.

First, as was explained in Section I, *supra*, it is not at all clear from this Court's precedent that an implied private right of action does exist to enforce disparate impact regulations promulgated under Section 602. As the Third Circuit in *Seif* conceded, "*Guardians* did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602." *Seif*, 132 F.3d at 929. Hence, given the extreme uncertainty as to whether a right to bring a private cause of action under Section 602

regulations even exists, it is impossible to conclude that Congress has somehow endorsed this right.

Second, the idea of congressional acquiescence is doctrinally flawed. As this Court explained in *Central Bank*:

> Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. "It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation . . . ."'

Central Bank, 511 U.S. at 186 (quoting in part *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). *Accord Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

The Third Circuit's congressional intent analysis is fundamentally flawed. By looking only to congressional intent surrounding the 1987 amendments to Title VI, and ignoring the intent of the Congress that enacted Section 602 as expressed in the language of the section, the Third Circuit engaged in a method of determining legislative intent which has been expressly rejected by this Court. The errors made by the Third Circuit have now been compounded by the court below, which relied on the Third Circuit's conclusion that an implied private right of action was supported both by Title VI's legislative scheme and history. *Sandoval*, 197 F.3d at 504. This Court should grant the petition because both the Third and Eleventh Circuits have decided an important federal question in a way that conflicts with the relevant decisions of this Court.

CONCLUSION

In an attempt to determine whether there exists an implied private cause of action to enforce agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964, the court below, as the Third Circuit before it, ignored the language of the Act and instead improperly relied on later legislative history. As both of these lower courts concluded, however, this Court has never squarely addressed this important federal issue of a private right of action. Absent a definitive opinion from this Court, lower courts will continue to struggle with this question.

DATED: July, 2000.

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